



Chairman Phil Isenberg
c/o Ms. Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Sent Via Email: recirculateddpeircomments@deltacouncil.ca.gov

RE: Delta Caucus DPEIR recirculation comments & Draft Plan

Dear Chairman Isenberg and Delta Stewardship Council Members:

The Delta Caucus (Contra Costa, Sacramento, San Joaquin, Solano and Yolo County Farm Bureaus) appreciates the opportunity to comment on the Delta Plan Draft Program EIR. As you know, the Delta Caucus has been extensively involved in the Delta Plan review process and has submitted detailed comments on the many previous versions of the draft Delta Plan. For the sake of space and brevity, we will not restate all of our previous comments or objections here.

Instead, the Delta Caucus submits this letter to jointly address the recirculated draft Environmental Impact Report (Draft EIR) and the November 30th version of the draft Delta Stewardship Council Plan (Draft Plan). For ease of reading the first portion of this letter addresses policy concerns arising from the Draft Plan. The second portion of this letter addresses shortcomings in the Draft EIR.

This letter focuses comments on deficiencies of the Draft EIR and on unwise or the absence of effective policies and recommendations within the Draft Plan. The Delta Caucus, however, reaffirms its previous comments and objections and incorporates them herein by reference and in particular the previous letter written to the Council concerning the deficiencies in the EIR. With respect to the comments to the draft EIR, it is the Delta Caucus's opinion that the Council did not seriously take into account the comments presented in our comment letter and, further, the Council failed to make good faith reasoned responses to our comments, a separate and independent basis for concluding the EIR is legally deficient. Hence we attach our earlier comment letter to this letter as though present in full here. The Delta Caucus objects to the Delta Stewardship Council certifying the EIR.

Members of the Delta Caucus are the very farmers the Draft Plan extols and expressly intends to protect and assist. For instance, the Draft Plan acknowledges agriculture is the Delta's "primary land use...a key economic sector, and a way of life." Draft Plan at 179. The Draft Plan adds: "The Delta Stewardship Council envisions a future where...[a]griculture will continue to thrive on Delta's rural lands..." (Draft Plan at 178) and identifies "proposals to protect, enhance and sustain...agriculture" as a major strategy of the Draft Plan (*Id.*), including "increased investment in agriculture". Delta Plan at 179.

Quantifying farming's economic importance to the region and the state, the Draft Report discloses that, "the total economic impact of Delta agriculture is 13,179 jobs, \$1.059 billion in value added, and nearly \$5,372 billion in economic output." Draft Plan at 191. The report notes agriculture "define(s) the Delta as a place." Draft Report at 192.

However, after evidencing agriculture's economic importance by presenting impressive economic numbers, the Draft Report substantially misses the mark concerning agricultural policies and strategies. As explained subsequently, the Draft Report either omits meaningful agriculture policies, suggesting the authors do not understand either agricultural operations or policy, or alternatively offer largely meaningless policies about "wildlife-friendly agriculture" or agritourism which are either irrelevant to functioning agricultural operations or on balance harmful to long term agricultural interest in the Delta region.

Thus the Draft Report provides the Delta Caucus with substantial frustration. As explained below the proposed policy offers little or nothing to the agricultural industry and suggests to us the Council staff does not understand the threats and opportunities facing agriculture.

The Caucus's offer to meet with the Council staff and work collaboratively about meaningful agricultural policies has been essentially rebuffed. Instead each Council report contains the same empty or adverse policies, the Caucus continues to express opposition to the Draft Plan and the Council staff makes no effort to understand and reconcile legitimate policy questions and concerns presented by the Caucus. We again express our belief that meaningful meetings with the Council staff should be held. This chain of events does not produce appropriate and useful public policies.

With this overview in mind, the Delta Caucus emphasizes major agricultural policy issues that have been omitted or mishandled in the Draft Report. In the interest of time and space and since these issues have been ventilated in greater detail in earlier comments offered to the DSC, we have opted to emphasize the following issues to illustrate the Draft Plan's shortcoming

regarding agriculture. But these illustrative problems do not exhaust all of the problems we perceive are found in the Draft Plan.

1. The Draft Plan offers a distorted, unrealistic and potentially adverse emphasis on “wildlife-friendly” agricultural practices and a future expansion of agritourism.

Without offering any empirical economic data or economic analysis, the Draft Plan baldly asserts that practices to “maximize habitat values” support Delta agriculture. (Draft Plan at 197.) To put a finer point on it, this pivotal statement lacks a scintilla of supporting evidence. Undeterred by this lack of evidence, the Draft Report proceeds to argue Delta farmers must “implement ‘wildlife-friendly’ management practices to maximize habitat values.” (Draft Plan at 206.) The Draft Report then reduces this wobbly and highly questionable concept into a recommendation for state agencies to use their regulatory power to “encourage habitat enhancement and ‘wildlife-friendly’ farming systems.” (Draft Report at 207.)

To start with, this entire analysis, policy discussion and recommendation has virtually nothing to do with sustaining and promoting the agricultural industry and virtually everything about burdening the agricultural industry with the disproportionate cost and expense of a largely societal benefit, preserving land for selected bird and animal species. Thus the proposed policy directly encourages other public agencies to exercise regulatory power in a manner requiring farm operations to measurably change farming operations to accommodate unrelated wildlife considerations. Plus the unstated but clear threat to the agricultural industry is that the DSC will exercise its considerable regulatory power under the guise of reviewing Covered Actions to exact changes to agricultural operations as conditions precedent to upholding a local government action concerning the farming operation.

Imposing unrelated conditions to advance larger social benefits in exchange for a permit is a common practice by California regulatory authorities. See, for example, *Nollan v. California Coastal Commission* (1987) 107 S.Ct. 3141; *Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783; *Bixel Associates v City of Los Angeles* (1989) 216 Cal.App.3d 1208. The Draft Plan’s analysis and recommendation encourages the DSC and other regulatory agencies to treat the agricultural community as having a special and distinct obligation to provide habitat that is greater than the obligation held by the general public, even though the general public benefits by expanding the amount of habitat and open space land. Imposing this special significant financial burden on the agricultural community rather than the public at large represents a significant and major threat and the Draft Plan should be revised to avoid this unintended consequence.

Simply stated, our members worry about regulatory agencies seeking to support the co-equal goals by intruding into organic economic issues such as cropping patterns or crop decisions. The Delta Caucus does not question whether creating or enhancing land for special species habitat is salutary. It is. However, the Draft Plan emphatically and dangerously shifts a significant portion of the burden of accomplishing this general public goal from the general public to the agricultural community. This dramatic shift in responsibility raises serious Constitutional and policy questions.

2. Defining normal agricultural practices as Covered Actions will impede or impair customary agricultural decisions and operations.

Presently some types of agricultural actions within the Delta area require discretionary land use approvals from local agencies. These actions constitute Covered Actions. Many of the representative counties surrounding the Delta have adopted land use regulations requiring discretionary land use permits for certain identified farming practices and operations. For purposes of illustration only, one of the counties, San Joaquin County, requires discretionary land use permits for the following uses in lands designated agriculture on the general plan and classified agriculture in the zoning ordinance:

1. Farm related aerial services
2. Agricultural processing preparation services
3. Agricultural processing food manufacturing
4. Feed and grain sales
5. Agricultural warehouses
6. Raising exotic animals
7. Raising hogs
8. Training small animals
9. Educational animal projects
10. Small breeding kennels
11. Communication services
12. Custom agricultural manufacturing
13. Farm services
14. Wholesale nursery
15. Petroleum and gas extraction
16. Farm produce stands
17. Essential public services
18. Nature preserves
19. Minor utility services
20. Small boutique winery

San Joaquin County Development Code Table 9-605.2 (pp. 403-414).

What overarching public policy purpose is served by local government decision to allow "raising exotic animals" or operating small fruit stands or training small animals or constructing agricultural warehouses (barns) to fall within the definition of "Covered Actions" and thereby be subject to DSC jurisdiction?

The cost and delay to agriculture by treating such activities as Covered Actions substantially chills the vitality and growth of the agricultural industry and diminish the economic importance of agriculture within the region and state.

Furthermore, certain California counties are considering whether to increase their land use regulatory power over agricultural activities, including the type and time for cultivating crops. These decisions clearly fall within the present definition of Covered Actions. What prevents either the local government or the DSC during the appeal process to require a farmer to incorporate "wildlife-friendly" practices or adopt "agritourism" in order to advance the co-equal goals and therefore receive the local government permit or survive an appeal to the DSC?

As explained previously, adding "wild-life friendly" or "agritourism" conditions before approving local land use decisions about farming activities and practices raises serious Constitutional, policy and other legal issues. Thus, the proposed Draft Plan has the unintended consequence of requiring one industry, agriculture, to assume a substantially disproportionate burden in developing "wildlife-friendly" land use patterns or promoting agritourism. This burden, exacted in exchange for developing or expanding farming operations, represents as serious a taking of the farmer's real property as a direct physical invasion of that property by a government agency.

3. The vagueness contained in the present definition of "Covered Actions" allows the definition to be expansive and ambulatory with unintended consequences. This raises Due Process concerns and policy questions.

In the future, at least some Delta counties may require use permits for cropping patterns or changing in cropping activity. Although no Delta county presently does so, such land use permits are required in places like Monterey County. If any Delta county enacts an ordinance requiring such local discretionary land use permits, this local government action constitutes a "Covered Actions" within the present meaning of the Delta Plan. This automatically and without any formal action by the DSC after a noticed public hearing expands the Council's jurisdiction over Delta farming activities. This automatic expansion of Council jurisdiction occurs without accommodating due process consideration and without any chance for affected public to comment on the unwarranted expansion of state regulation or for an intelligent discussion of the relative public policy merits to this expansion.

Moreover, because the local approval itself would not technically be valid until the Council determined the action was consistent with the plan (assuming there was an appeal of the consistency determination), farmers could potentially miss entire crop seasons if caught in a prolonged appeal process. Because none of these impacts have been disclosed or discussed in the Draft Plan or the Draft EIR, both the Draft Plan and Draft EIR should comprehensively evaluate the indirect physical effects associated with the Council's potentially *ad hoc* expansive jurisdiction.

In addition, the Delta Caucus is particularly interested in the Delta Stewardship Council ("Council") discharging its public duty to satisfy the requirements of the California Environmental Quality Act ("CEQA"). Generally speaking, the Draft EIR is legally deficient and does not fulfill its duty as an informational document. Rather than certify the Draft EIR, the Council is requested to conduct a sufficient evaluation of the potential environmental effects and thereafter provide a new public review comment period.

These comments are founded on the principle that an EIR acts as an informational document identifying potentially significant impacts of a project, as well as alternatives and mitigation measures necessary for informed decision-making (Pub.Res.C. §21002.1), and that an EIR's findings and conclusions must be supported by substantial evidence. *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376. An adequate EIR "must be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences" and "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Id.* The Draft EIR does not meet this threshold. Accordingly, the Draft EIR is not adequate for certification, and the Project cannot be approved at this time.


Specifics concerning the legal deficiencies about the EIR are presented in the attached document. In the interest of time and space these comments are not repeated in the body of the letter but in our opinion remain legitimate and serious criticisms of the draft EIR.

We remain willing to meet with the DSC to discuss appropriate and strong public policy based recommendations and policies for Delta agriculture. We urge the DSC to accept this offer to meet and discuss these vital public issues.

Sincerely yours,



Russell E. van Löben Sels
Chairman, Delta Caucus



Wayne Reeves
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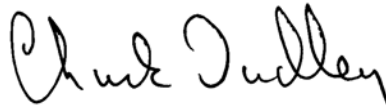
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